No. 81

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

UNITED STEELWORKERS OF AMERICA, CIO,
AND NUTONE, INCORPORATED

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT UNITED STEELWORKERS OF AMERICA

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QUESTION PRESENTED

The question here presented, as stipulated below (R. 9) by all of the parties—the Board, the Union, and the Company—is this:

> "Whether an employer commits an unfair labor practice if, during a pre-election period, it enforces an otherwise valid rule against employee distribution of union literature in the plant, while, during that same period, itself distributing non-coercive anti-union literature within the plant in a context of other unfair labor practices, committed prior to the election period and thereafter." (R. 7.)

STATEMENT

In April 1953 the Steelworkers Union began efforts to organize the employees of NuTone, Inc. (R. 12.) The company was not neutral. It actively opposed the Union. In May and June, its supervisory personnel unlawfully interrogated workers as to their knowledge of Union activities, solicited reports on Union activities, and promised benefits to employees who remained loyal. (R. 14-16.) Sometime in June, it discharged three employees because they were active on behalf of the Union.[1] Finally, beginning on June 12, it "actively campaigned for the Union's defeat" by ordering foreman to distribute "anti-union propaganda"[2] throughout the plant.

The Company's literature, while not coercive, was certainly not dispassionate. The "message" distributed by the foremen within the plant on June 12 denounced Union statements as "just a pack of lies" (R. 83) and said that all the union wanted was "to take the $36.00 a year from you and perhaps lose you a lot of working days. . . ." (R. 85.) A leaflet distributed in the plant on August 12 told the employees "You Lose With CIO" and that a vote against the union was a vote against strikes, against hatred among employees and against "outsiders pushing you and telling you what to do." (R. 64, 87.) On August 18, the day before the election, the leaflet distributed by the Company within the plant boasted that, in a prior election, "We beat the Union—6 to 1." (R. 62, 81.)

At the same time as the Company engaged in what the

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[1] The exact date is uncertain because the three employees were among a number who had been laid off for economic reasons on June 9 and, as found by the Board, the Company decided, sometime during the period of layoff, with "calculation and intent to restrain and discourage Union membership" not to recall them. This decision to discharge, although made earlier, became effective on June 23, when the other employees who were also laid off, but who had less seniority, were recalled to work. (R. 25.)

[2] The words are those of the Trial Examiner. (R. 18-19.)

Trial Examiner subsequently called "campaigning against the Union in the normal arena, and the most effective one for reaching the employees" (R. 20), it simultaneously denied access to that arena by the Union. Between August 5 and August 12, the Company issued and posted throughout the plant notices warning employees that the Company had a rule against posting signs on company property, against soliciting or campaigning on company time, and against the distribution of handbills or other literature on company property (R. 76, 17-19). These rules, the company said, applied to both sides of the union question. The company did not, however, regard the rules as applicable to its own action in ordering its supervisors, on working time, to engage in precisely the conduct forbidden by the rules in distributing anti-union campaign material to all of the employees within the plant. Indeed, as the Trial Examiner here noted, "one piece of the Company's campaign m terial was distributed on the very date on which the Company posted its . . . rule . . . which prohibited employees from passing out literature on Company property." (R. 19.)

The Union lost the election. Immediately thereafter, in accordance with a suggestion "which the Company had planted in its election propaganda" (R. 28), an "Employee Committee" was organized. The Company gave this organization its open assistance and support. Part of this support was mimeographing material for it and having it distributed by foremen and others throughout the plant, in the same way that the Company's anti-Steelworker campaign material had been distributed.[3] (R. 31.)

[3] In explanation of these apparent violations by the Company of its no-distribution rules, the Company in the court below blandly asserted that there was no such violation because the rules were never intended to prevent the Company from campaigning in this way against the Union; it was only intended to apply to employees:

"NuTone never intended to restrict its own posting and distribution activities when it announced them. NuTone was not talking out of both sides of its mouth at once—both to itself and to its em-

The Union filed unfair labor practice charges (and also sought to set aside the election). In the unfair labor practice proceedings, the Company was found to have violated the Act by its interrogation and promises to individual employees, by the three discharges and by the assistance to the company union. (R. 39, 40, 44.) These findings are not contested here. With respect to the claim that the employer had discriminatorily enforced the no-distribution rule, the Trial Examiner concluded that when "the Company itself entered the anti-union lists and actively campaigned for the Union's defeat on a field to which it had denied admittance to the Union" it committed an unfair labor practice. (R. 18, 20.) The Board reversed, Member Murdock dissenting. The Board's view, concisely stated by it, was that "valid rules against solicitation and other forms of union activity do not control an employer's actions. Management prerogative certainly extends far enough so as to permit an employer to make rules that do not bind himself." (R. 45-46.)

The Court of Appeals, in turn, reversed the Board and directed it to issue the order which the Trial Examiner had

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ployees; it meant that only voting employees would hear and heed the rules and it spoke directly to them, alone.

"One more important consideration is the intended *duration* of these rules. This intendment is to be ascertained by fitting them into their factual context—a situation beginning with the raising of the representation question which brought on the intense campaigning and in consequence, the rules, but which ended with finality on the election date. The rules were clearly intended to deal with a short period and a transitory situation . . . They did become ineffective automatically on August 19.

"Therefore, in plain and controlling distinction from similar decisions finding violations of Section 8 (a) (1), NuTone did not discriminatorily enforce its no-distribution rule by enforcing it against employees while relaxing it with respect to itself, for the rule never applied to it."

(Brief for NuTone, Inc. in Nos. 12,754 and 12,812, Court of Appeals for the District of Columbia Circuit, pp. 43-44.)

recommended. The Board, the Solicitor General *dubitante*,[4] petitioned for certiorari, alleging a conflict between the decision below and the decision of the Sixth Circuit in *NLRB* v. *F. W. Woolworth Co.*, 214 F. 2d 78.

SUMMARY OF ARGUMENT

I.

This case presents the question of whether an employer violates the National Labor Relations Act when he establishes a rule limiting communication among his employees on plant property concerning union organization and, at the same time, uses the very method of communication which he has forbidden to employees in conducting his own anti-union propaganda. Until recently such action had always been held by the National Labor Relations Board to constitute an unfair labor practice. This was true irrespective of the method of communication involved. In this case, however, the Board set forth a broad rule, applicable to all forms of solicitation, that management had the prerogative of establishing rules limiting solicitation which were not binding on its own anti-union activities. This conclusion was justified by the Board on the basis of the provision of the National Labor Relations Act guaranteeing the right of free speech, Section 8(c).

The same question has been considered, in the context of oral solicitation, in the Second and Sixth Circuits, as well as by the Court of Appeals in this case. The Second Circuit said that no issue of free speech was involved where a no-solicitation rule was disparately enforced. Judge Allen, in the Sixth Circuit, disagreed. The court below concurred with the Second Circuit and disagreed with Judge Allen's view.

The Board's brief on the merits here virtually confesses error as far as Section 8(c) is concerned. The brief argues,

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[4] Pet. p. 11, fn. 6.

instead, that the result reached by the Board here can be justified on the basis of the differences which exist between oral solicitation and the distribution of literature.

In view of this shift of position the brief for respondent in this case will present (1) argument on the Section 8(c) question which the Board and the Court of Appeals decided but which is now not pressed by counsel for the Board and (2) the reasons why we believe that the position now asserted by counsel for the Board is in error.

II.

Section 7 of the National Labor Relations Act provides that employees shall have the right to self-organization and to engage in other concerted activities for the purpose of mutual aid or protection. Although this language is absolute, the Act has been construed as permitting an employer to interfere with union organization by promulgating and enforcing rules governing employee conduct on his premises which are reasonably necessary to maintain discipline and permit efficient production. Thus, solicitation of any kind may be forbidden during the time employees are supposed to be working. In some establishments, such as a retail store, in which the requirements of the business so dictate solicitation may even be prohibited on the selling floor during non-working hours. But in the usual industrial plant, the employer may not forbid employees from soliciting for the union on non-working time. He may, however, under the present Board rule, prevent them from distributing literature in the plant proper, even on non-working time, in the interest of keeping the plant clean and orderly.

All of these rules may be lawfully enforced only on the assumption that their purpose is the maintenance of plant efficiency or discipline. Therefore, if an employer applies such a rule only against union adherents, while permitting employees opposed to the union, or outsiders, to solicit or distribute literature in a way forbidden to others, the Board and the courts have always concluded that the rule itself

is thus shown to be invalid. This requirement of non-discrimination applies even to rules forbidding distribution or solicitation on plant property by non-employees, as this Court recognized in *Babcock & Wilcox Co.*, 351 U.S. 105, 112.

The same result would seem to be required where it is the employer himself, rather than others, who are favored by disparate enforcement of the rule. Originally, the Board interpreted the Act as forbidding entirely any anti-union propaganda by the employer. The decisions of this Court, and the requirements of Section 8(c), which was inserted in the Act in 1947, however, made it clear that an employer was to be as free as the next man to participate in the campaign to determine whether the employees should select a union to represent them.

But the right to speak freely, given by Section 8(c), should not affect the established doctrine that a rule forbidding or limiting employee solicitation constitutes a violation of the Act unless it is applicable to all. And so the Board held in the first cases in which this issue was presented after the enactment of Section 8(c). In this case, however, it reached the opposite result in reliance on its prior decision in *Livingston Shirt Co.*, 107 NLRB 400.

The *Livingston Shirt* case itself was directly concerned with the Board's *Bonwit Teller* doctrine. In *Bonwit Teller, Inc.*, 96 NLRB 608, there were three factors: (1) a rule forbidding solicitation, even on non-working time, in a department store, (2) an anti-union speech by the employer to employees assembled for that purpose on company time and property, (3) a union request that it be given a similar opportunity to address the employees in such a meeting. The Board held not only that the combination of the no-solicitation rule and the speech by the employer on working time constituted an unfair labor practice but also that it was an unfair labor practice to deny the union's request that an audience of employees be assembled for an answering speech

by the union organizer. Subsequent to the *Bonwit Teller* case the Board applied this latter principle even in the absence of any no-solicitation rule.

In the *Bonwit Teller* case, the Second Circuit refused to enforce the portion of the Board's order which required that the union be given an equal opportunity to address the employees but agreed, Judge Swan dissenting, that the disparate enforcement of the no-solicitation rule constituted an unfair labor practice. The Board, however, continued to apply the full *Bonwit Teller* doctrine.

After the Board's personnel changed in 1953, the Board reversed the broad *Bonwit Teller* doctrine in the *Livingston Shirt* case, although it retained the doctrine for the special circumstances actually presented in the *Bonwit Teller* case. The opinion of two members of the Board in *Livingston Shirt* (which was the opinion relied upon in the present case) held that the grant of the right of free speech by Section 8(c) could not be conditioned by a requirement that the employer donate his premises and working time to the union for a reply to his speech. It retained, however, just such a requirement where the employer had invoked a broad no-solicitation rule covering non-working time. In the *Woolworth* case in the Sixth Circuit, Judge Allen used essentially the reasoning of the controlling opinion in *Livingston Shirt* as the basis for refusing to enforce a Board order where there was a broad no-solicitation rule. Judge Miller concurred, but only on the ground that, as he saw the facts, there had been no enforcement of the broad no-solicitation rule, and Judge McAllister dissented.

Although the precise holdings of the *Livingston Shirt, Bonwit Teller,* and *Woolworth* cases with respect to the duty of an employer to take the affirmative action of providing a "captive audience" for the union are not involved here, the reasoning of these cases cannot be distinguished. The theory expressed in *Livingston Shirt* and in Judge Allen's opinion in the *Woolworth* case, that Section 8(c) pre-

vents any finding of an unfair labor practice where an employer enforces a rule limiting employee communication but ignores that rule himself, would apply to rules against distribution as well as to rules against solicitation. But, we contend, that theory is plainly erroneous.

Section 8(c) guarantees free speech to employers. But it does not prevent a finding that an unfair labor practice has been committed when an employer has unfairly prevented his employees from speaking. The fact that the employer has spoken may be what makes the restriction on others unfair but it is the restriction which violates the Act, not the speech. This is plainly true when it is anti-union employees or third persons who are permitted to violate the rule. In such cases it is not the speech of the anti-union employees or the outsiders which constitutes an unfair labor practice but the fact that the restriction on employee communication, in conjunction with the permission granted to others to speak against the union, is interference with the employees' right of communication, guaranteed by the Act. If the theory of the Board, as expressed in *Livingston Shirt* and followed in this case is correct, then no unfair labor practice could be found where outsiders or anti-union employees were permitted to ignore a rule limiting solicitation or communication, for the right of free speech guaranteed by Section 8(c) is not limited to employers but is applicable to all.

III.

Unlike the Board itself, counsel for the Board here argue that Section 8(c) does not provide a uniform answer to the broad question of whether an employer can properly limit employee communication in the plant by a rule which does not apply to himself. The question, they say, is whether there are alternative methods of effective employee communication. In the case of oral solicitation, they urge, there is no adequate substitute. Hence, they say, such action by the employer does constitute an unfair labor practice where

the rule limits oral solicitation. In the case of distribution of literature, however, employees can distribute such literature just as effectively outside the plant gates as they can in the plant proper, and hence the employer's action is not a violation of the Act.

This reasoning washes Section 8(c) out of the case. It undermines, however, the basic premise concerning the relationship between employee organizational rights and the employer's property rights which has been fundamental to the entire course of court and Board decisions in the years since the Act was first passed. That premise is that no restriction may be placed on the employees' right to discuss self-organization among themselves on the plant premises unless the employer can demonstrate that such a restriction is necessary to maintain production or discipline. *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105 at 113.

Heretofore a showing of non-availability of other methods of communication has been applicable only to cases where it was sought to justify a requirement that non-employee organizers be given access to the plant or the parking lot. Counsel for the B rd here, however, seek to make the same considerations apply to employees, who are in the plant with the employer's permission to do his work. Their major premise is that restrictions on such employee communication should be judged on the basis of the presence or absence of other channels of communication. Their minor premise is that employees can distribute literature as effectively off the premises as on. Under this view, it would follow that, even if a rule forbidding plant distribution were not justified by the necessity of plant production (as shown by the fact that the employer himself ignored it) still it would not violate the Act because of the alternative justification for the rule. The different result which the Board now argues for in the case of oral solicitation would follow because of the assumed absence of any satisfactory alternative to such solicitation on plant premises.

Both premises, we believe, are in error. The major premise is contrary to the terms of the Act and all of the precedents under it. It ignores the fact that channels of communication are not alternative but cumulative. This is graphically demonstrated in this case by the fact that the company found it desirable and useful to distribute anti-union propaganda inside the plant despite the fact that it also distributed such propaganda to the employees by mail.

Counsel for the Board justify their departure from the established conceptions in this area by interjecting the notion that an employer is entitled to use his ownership of the plant property as a weapon in the contest concerning union organization so long as he does not use that ownership to cut off channels of employee communication. This same basic approach, although not expressed by the Board here, does underlie the decision in *Livingston Shirt*. In that case the Board permitted an employer to restrict employee solicitation on working time while using working time for his own anti-union solicitation. This, the Board said, was not a violation of the Act since any disparity in the opportunity to discuss the union question which resulted was a consequence of the employer's ownership of the property and of the working time.

This conception of the relationship between property rights and the organizational rights guaranteed by the Act contradicts the whole tenor and purpose both of the Wagner Act and of the Taft-Hartley Amendments. As this Court recognized in *NLRB* v. *Stowe Spinning Co.*, 336 U.S. 226, the Act places requirements upon an employer with respect to freedom of employees on plant property which are quite distinct from the rights of employees with respect to other property of the employer. Taft-Hartley was supposed to equalize the rights of employers and unions. The Board did say, in *Livingston Shirt*, that the recognition of the employer's rights to use his own property (viz., the plant) and deny it to employees, in propagandizing against the union

did not involve any inequality because the union had the right to use its own property (viz., the union hall) to propagandize for the union. But this is horse and rabbit stew equality.

The minor premise of the Board's argument is, of course, relevant only if the major premise is acceptable. And we therefore do not believe that the Court is even required to pass on it. A brief examination of the considerations involved in the distribution of literature, however, shows that there are many reasons why it is not true that such distribution can as effectively be conducted at the plant gates as it can in the plant itself. In any case, the assertion by counsel for the Board that there is a substantial equivalence between the two methods of distribution is flatly contradicted by the findings of the Trial Examiner in this case. We do not, however, urge the Court to base its decision on these considerations, but rather urge that it reaffirm the rule that no restriction on employee communication on plant property is permissible, irrespective of the presumed existence of alternatives, unless there is a showing that the restriction is necessary to maintain production or discipline. Since no such showing can be made in this case because of the employer's actions in himself distributing anti-union literature, both established precedent and elementary considerations of fairness require affirmance of the decision of the Court of Appeals.

ARGUMENT

I.

INTRODUCTORY STATEMENT

This case presents to this Court, for the first time, the problem of interpretation of the National Labor Relations Act which is created when an employer simultaneously: (1) establishes a rule in his plant limiting communication

among each other by employees about the union, and (2) uses the plant premises for his own anti-union communication. This problem has a number of variants, depending upon the scope of the rule inhibiting employee communication and the nature of the employer's anti-union communication. In one form or another, the problem has agitated the Board and the lower courts since 1947. But, until recently, one simple proposition seemed to be true: an employer could not prevent employees from using, on their own time in the plant, the same method of communication which he himself, or his supervisors, used against the union. Any such discriminatory action seemed plainly to be an interference proscribed by the Act with the right of employees to self-organization.

This proposition was true whatever the method of communication involved. Differing rules had been developed, to be sure, with respect to the extent to which a uniformly enforced rule limiting communication could be lawfully promulgated—the difference depending upon whether the communication was oral or written, and whether the persons restricted were employees or non-employee organizers. But the principle that a rule, whatever its proper extent, must be uniformly applicable to both sides did not depend on the particular kind of communication involved.

In this case, the Board decided that the requirement of uniformity of application did not apply to the employer. It said flatly that

> "valid plant rules against solicitation and other forms of union activity do not control an employer's actions. Management prerogative certainly extends far enough so as to permit an employer to make rules that do not bind itself. Otherwise, an employer can only enforce a rule he promulgates so long as he conducts himself according to the rule."

In setting forth this rule, the Board did not distinguish between oral solicitation and the distribution of literature. To the contrary, it relied primarily upon its prior decision in the *Livingston Shirt* case,[5] which involved oral solicitation rather than the distribution of literature, and the views with respect to Section 8(c) of the Act there set forth. Indeed, the Board went to great pains to specify that, in its opinion, the result, which it believed to be dictated by Section 8(c), applied equally to oral solicitation and the distribution of literature.

The issue presented here, therefore, is much broader than the disparate enforcement of no-distribution rules. It involves the basic question of whether the Act permits an employer, either by virtue of Section 8(c) of the Act or by virtue of his inherent management prerogatives, to convert the working place into a forum to which he, but not his employees, can have access.

Until the time counsel for the Board filed their brief on the merits in this Court the question has usually been considered to present difficulties only with regard to Section 8(c). Section 8(c) says, in substance, that non-coercive employer communication on the union question shall not constitute an unfair labor practice. The question presented was whether, in the light of that Section, the employer's in-plant non-coercive communication can be regarded as an unfair labor practice if he forbids employee in-plant communication of the same kind.

That question had been considered, prior to this case, in two Courts of Appeals. In *Bonwit Teller, Inc.* v. *National Labor Relations Board,*[6] the Second Circuit held that "neither Section 8(c) nor any issue of 'employer free speech' is involved" in the case of disparate enforcement of a rule forbidding oral solicitation on company premises. If an em-

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[5] 107 NLRB 400.

[6] 197 F. 2d 640; cert. denied, 345 U. S. 905.

ployer chose to avail itself of the privilege of banning solicitation, the Court said, it was "required to abstain from campaigning against the union on the same premises to which the union was denied access." 197 F. 2d at 645. Judge Swan dissented.

The same issue also came before the Sixth Circuit in *NLRB* v. *Woolworth Co.*, 214 F. 2d 78, again in the context of oral expression rather than the distribution of literature. In the *Woolworth* case Judge Allen, speaking for herself alone, expressly disagreed with the views of the Second Circuit and concurred with Judge Swan's dissent in the *Bonwit Teller* case. In her view, Judge Swan was correct in holding, in her words, "that Section 8(c) has direct and controlling application and that a no-solicitation rule cannot cut down the rights given the employer under Section 8(c)."[7] Judge Miller concurred in the result, although not in Judge Allen's opinion. Judge McAllister dissented.

In this case, too, in the Court of Appeals the "close and elusive" question (R. 108) related to Section 8(c) The Court concluded, however, that on that issue it agreed with the prior holding of the Second Circuit and disagreed with the opinion of Judge Allen in the Sixth Circuit (which it erroneously stated to be the opinion of the Circuit itself).

It was on the basis of this conflict that the Board petitioned for certiorari. In that petition it said:

> "the effect of the decision below is that an employer may not simultaneously exercise his unfettered right under Section 8(c) to express his non-coercive opinions and his right, also well settled, to limit employee *solicitation and distribution* in the plant. The contrary view, set forth in *Woolworth,* preserves both rights." (P. 8, emphasis added.)

In the brief which they have now filed on the merits,

[7] 214 F. 2d 78, 81.

counsel for the Board have virtually confessed error with respect to Section 8(c). They no longer contend that the view "set forth in *Woolworth*" is correct, and they no longer argue that the issue here concerns the relationship between Section 8(c) and "no distribution (and, by analogy, no solicitation)' rules."[8] With respect to oral solicitation, they concede, the employer cannot forbid his employees to solicit on the plant premises on non-working time and simultaneously use those premises to solicit against the union, and Section 8(c) is irrelevant. "Section 8(c) affords the employer no immunity here, for the vice lies not in the employer's speech but in the fact that he has deprived the employees of their normal right to use plant premises for solicitation during working hours and has then taken advantage of that deprivation for his own anti-union purposes."[9]

But, they argue, this does not resolve the present case because different considerations apply with respect to the distribution of literature. Employees can distribute literature outside the plant gates. Therefore, they say, the employer's action in forbidding them to distribute inside the plant, while doing so himself, does not have the same inhibitory effect upon the exercise of the self-organizational rights guaranteed by Section 7 as would similar action with respect to oral solicitation and, hence, a different result must follow.

This is a new argument. In the Court of Appeals, the case was argued, and decided, on the basis that the statute must be identically applied to both forms of dissemination. And certiorari was requested on the basis of an alleged conflict between the decision of the court below (involving distribution of literature) on the one hand and the *Woolworth* decision in the Sixth Circuit and Judge Swan's dissenting opinion in the Second Circuit (both involving oral solicitation) on the other. Now we are told that *Woolworth* is

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[8] Petition, p. 9.
[9] Bd. Brief, p. 39.

wrong (and wasn't really the view of the Sixth Circuit), that Judge Swan is wrong, and, by implication, that the Board's reliance on Section 8(c) is wrong. But, the Board's order, we are told, was nevertheless correct.

This shift of position poses a dilemma. The Section 8(c) question posed by the petition for certiorari is an important one on which there is a conflict among the circuit judges, if not the circuits. And it does have broad application to all forms of employer and employee communication. At the same time, however, the Court has before it the rationale advanced by the attorneys for the Board in this Court and presumably it must also decide whether this new view can be urged to sustain the result reached by the Board in this case even though the reasoning adopted by the Board in reaching that result be disavowed.

Our argument in this case, therefore, must be a double one. We think that, despite the Board's present disavowal of its own decision with respect to Section 8(c), we are obliged to present to the Court full argument in support of our position that the view of that Section taken by the court below was correct, even though such argument is not really responsive to the Board's brief. We are also obliged, of course, to present the reasons why the views now advanced by the Board cannot properly be sustained.

Accordingly, our argument in this case must necessarily be divided into two major branches. In the first branch we will present substantially the argument which we presented to the court below in support of the general proposition that the Board erred in holding that Section 8(c) gives management a broad prerogative to establish and enforce rules against employee solicitation, either oral or written, which are not applicable to its own anti-union solicitation. In the second branch we will present the reasons why we believe that the position now asserted by counsel for the Board is in error.

II.

THE COURT OF APPEALS CORRECTLY HELD THAT SECTION 8(c) DOES NOT PREVENT A RULE FORBIDDING UNION SOLICITATION OR DISTRIBUTION IN THE PLANT BY EMPLOYEES WHICH IS NOT APPLIED TO THE EMPLOYER HIMSELF FROM CONSTITUTING A FORBIDDEN INTERFERENCE WITH EMPLOYEE SELF-ORGANIZATION.

1. *The Applicable General Principles.* In the absence of statutory or contractual limitations there would be no question that management's prerogative extended far enough so as to permit an employer to make virtually any kind of rule as to the conduct of employees on the employer's premises. If so minded, an employer could discharge employees for joining a union. He could forbid them to solicit for a union or to solicit against a union, whether on working time or on non-working time. He could establish rules as to what the employees could say or what they should wear. He could permit some employees to violate the rules and enforce them against others. And he could observe or violate these rules himself with impunity. The plant is his property and the employees are his employees.

But the National Labor Relations Act, in Section 7, provides in absolute terms that employees shall have the right "to self-organization, to form, join or assist labor organizations . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." Section 8(a) (1) of the Act makes it an unfair labor practice for an employer to interfere with, restrain, or coerce his employees in the exercise of the rights guaranteed in Section 7. And Section 8(a)(2) makes it unlawful to interfere with the formation of a labor organization.

The provisions of the federal Act obviously limit the employer's right to govern what activities employees may engage in on his property. Read literally and absolutely, the Act would seem to say that he can make no rules of any

kind, which would "interfere with . . . his employees in the exercise of the rights guaranteed in Section 7" "to join or assist labor organizations . . . and to engage in other concerted activities for the purpose of collective bargaining . . ." But, of course, the Act has not been construed as preventing the employer from promulgating and enforcing rules governing employee conduct on his premises which are reasonably necessary to maintain discipline and permit efficient production, even though such rules might interfere to a certain extent with self-organization by the employees.

In order for the rules to be valid, however, a showing must be made that they are necessary. The question is not whether the interference with activities protected by Sections 7 and 8 of the Act is so serious as to overcome the employer's property rights. At least as far as employees are concerned,[10] the only question is whether the interference can be justified on the basis of the needs of efficient production. As the Court said, in the *Babcock & Wilcox* case, at p. 113:

> "No restriction may be placed on the employees' right to discuss self-organization among themselves, unless the employer can demonstrate that a restriction is necessary to maintain production or discipline."

The principle is the same, whether the discussion is in the form of oral argument or the distribution of literature. Indeed, this Court's statement above quoted, which appears on its face to refer to oral discussion, was made in a case involving the distribution of literature and was bottomed on *Republic Aviation Corp.* v. *NLRB,* 324 U.S. 793, which actually involved the distribution of union cards and the wearing of union buttons.

Of course, the kind of rule which can be justified on the basis of the necessities of production necessarily depends on

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[10] Cf. *NLRB* v. *Babcock & Wilcox Co.*, 351 U. S. 105 (1956).

the kind of employee communication which is governed by the rule, as well as upon the kind of work being done on the premises. We turn now, therefore, to examination of the particular rules which have been evolved by the Board and the courts based on these factors.

2. *The Particular Rules.* The most important rule derived from the above considerations is simply that an employer can, without violating the Act, forbid union solicitation during the time when employees are supposed to be working. "Working time is for work" and not union activity, the Board has said. On the other hand, an employer cannot promulgate and enforce a rule prohibiting union solicitation by employees, even on company property, during non-working time such as luncheon or rest periods, or before or after actual work begins. Such a rule, in the absence of a showing that special circumstances make it necessary to maintain production or discipline, "must be presumed to be an unreasonable impediment to self-organization." *Peyton Packing Co., Inc.,* 49 NLRB 828, 843, (1943), quoted with approval in *Republic Aviation Corp.* v. *NLRB,* 324 U.S. 793, 804.

Certain businesses are of such a nature, however, that solicitation by employees even on non-working time can reasonably be prohibited. The nature of a retail establishment is such, the Board has said, that an employer can properly prevent union solicitation on the selling floor even during periods when the employees are not actively working. *J. L. Hudson Co.,* 67 NLRB 1403 (1946); *Marshall Field,* 34 NLRB 1 (1941); *Goldblatt Brothers, Inc.,* 77 NLRB 1262 (1948).

If, as in the present case, the solicitation of employees is not oral but takes the form of distribution of printed literature there is an additional factor to be considered. Even if the distribution is done on non-working time, handbills and circulars do tend to litter the property. And it can reasonably be argued that an employer has a legitimate

interest, irrespective of his attitude toward unions, in preventing such littering. The Board therefore held, at least up to 1944, that it was not unreasonable for an employer to prohibit distribution of handbills and similar literature within the plant itself whether such distribution was made on working time or on the employee's own time.

In *LeTourneau Company of Georgia,* 54 NLRB 1253 (1944), the Board was faced with a variant on this situation. In that case the rule against distribution applied not only to the plant itself but also to the Company's parking lot. Here too, the employer had an interest in preventing littering and the Board found that the rule was non-discriminatory, and had been established long prior to the Union's campaign, for the specific purpose of preventing littering. But it also found that the geography of the plant was such that distribution of literature to the employees was virtually impossible unless it was permitted on the Company's parking lot. Hence, balancing the employer's right to keep his property clean on the one hand against the employees' right to receive information to enable them to exercise their right to self-organization on the other, the Board determined that the enforcement of the no-distribution rule on the Company's parking lot constituted a violation of the Act.

The Court of Appeals for the Fifth Circuit reversed. This Court, in turn, reversed the Fifth Circuit and ordered that the Board's order against enforcement of the no-distribution rule be enforced. In so doing, it specifically noted that the rule against distribution of literature had been adopted to control littering and pilfering on the parking lot and that "there was no union bias or discrimination by the Company in enforcing the rule." Unlike the Board, however, this Court found that there was no "evidence or . . . finding that the plant's physical location made solicitation away from the Company property ineffective to reach prospective union members." Nevertheless, the Court ordered enforce-

ment of the Board's order. *NLRB* v. *LeTourneau of Georgia,* 324 U.S. 793, 797, 799 (1945).

In a companion case, decided together with *LeTourneau,* the Court came to the same conclusion with respect to a rule which had been applied to prevent an employee from distributing union cards in the plant lunch room. *Republic Aviation Corp.* v. *NLRB,* 324 U.S. 793 (1945).

This Court thus in both cases sustained Board orders based on special circumstances even though it specifically said there were no special circumstances. This result led the Board for a time to take a stricter attitude toward no-distribution rules. In *American Pearl Button Co.,* 56 NLRB 613, the Board had issued an order requiring an employer to rescind his rule against the passing out of "petitions" on Company property, without limitation to the parking lot. The Board's order was enforced by the Eighth Circuit in *NLRB* v. *American Pearl Button Co.,* 149 F. 2d 258 (C.A. 8, 1945). Then, in *American Book-Stratford Press,* 80 NLRB 914 (1948) and in *Chicopee Manufacturing Company of Georgia,* 85 NLRB 1439 (1949), the Board found a violation of the Act in the promulgation of a rule prohibiting the distribution of literature *within* the plant.

In neither of the latter two cases was there any showing that distribution of union literature at other times and places was impractical. Indeed, the Board seemed to take the position that the burden was upon the employer to establish the existence of special circumstances showing that distribution of union literature within the plant would have endangered the efficiency or production of the plant.

Beginning in *Newport News Dress Co.,* 91 NLRB 1521, (1950), however, the Board withdrew somewhat from this position. In that case the Board refused to find that a no-distribution rule violated the Act, referring not to the Supreme Court decision in the *LeTourneau* case but to its own decision in which the special geography of the plant was relied upon in justification for outlawing the no-distribution

rule. And in *Carolina Mills,* 92 NLRB 1141 (1951), the Board affirmed a Trial Examiner's report which found that the Company violated the Act by denying the Union the privilege of distributing literature on the premises only because distribution off the premises was not effective. Finally in *Monolith Portland Cement Co.,* 94 NLRB 1358 (1951), the Board overruled the *American Book-Stratford Press* case and the *Chicopee Manufacturing Corp.* case and made it clear that an employer "can lawfully prevent the distribution of literature in the plant proper, even during the employee's non-working time, in the interest of keeping the plant clean and orderly, at least where it is not evident that such activity cannot readily be conducted effectively somewhere off the employer's premises."[11]

[11] Oddly enough, the court decisions with respect to the distribution of literature support the stringent rule which the Board sometimes adhered to between 1945 and 1951. In addition to the *LeTourneau* and *Republic Aviation* cases in this Court, there are decisions in the courts of appeals which explicitly upheld the Board's right to set aside any no-distribution rules covering the plant proper unless the employer could show some special justification for such a rule. In addition to the *American Pearl Button* case, already cited, the Seventh Circuit expressly said that "an employer may not prohibit employees from distributing union literature upon his premises during non-working hours except under exceptional circumstances which are not shown in this case." *American Furnace Co.,* 158 F. 2d 376, 380 (1946). There is a strong dictum in the Fourth Circuit to the same effect in *Maryland Drydock Co.* v. *NLRB,* 183 F. 2d 538 (1950). There the Court of Appeals was faced with a situation in which the employer had forbidden the Union to distribute certain specific union literature on its premises. The Board found the Company guilty of violating the Act but the court refused to enforce the Board's order because of the insulting nature of the literature, which it said was "manifestly destructive of plant discipline." The court, however, conceded that the union had a right to distribute proper union literature on the Company's premises. Indeed, it said that "if the Company should refuse to permit the union to distribute proper literature on the premises the Board unquestionably has the power, upon a finding to that effect, to issue a cease and desist order and protect the right of the union to do so." 183 F. 2d at 542. In *N.L.R.B.* v. *Carolina Mills,* 190 F. 2d 675 (1951) the Fourth Circuit enforced a Board order based in part, it said, on the simple refusal to permit in-plant distribution of union literature.

All of these cases have involved employee activity. They all serve to illustrate the basic principles set forth above that the only permissible restrictions on union solicitation, whether oral or printed, by employees on the employer's property (or elsewhere for that matter) are those justified by the necessity of maintaining plant efficiency or discipline. The difference between the earlier Board cases dealing with the distribution of literature and the rule definitively announced in *Monolith Portland Cement Co., supra,* was that the earlier cases seemed to require evidence in the individual case to show the circumstances creating the necessity of prohibiting distribution in the interests of keeping the plant clean and orderly while, in *Monolith,* the Board said that such necessity would normally be assumed.

In none of the cases was the rule justified because the employer owned the plant property. The fact that the activity in question takes place on his property is immaterial. The employees are there by his invitation to perform his work. They cannot, under the Act, be deprived of the opportunity of using this most natural place to disseminate information concerning union organization so long as they do not interfere with the purpose for which they are there—performing the work.

3. *The Uniform Requirement That a Rule, to Be Valid, Must Apply to All.* It follows, and until this case had always been held, that what might otherwise be a valid rule against solicitation or distribution constitutes a violation of the Act if it is discriminatorily applied. If an employer permits employees to solicit against a union on company time and enforces a no-solicitation rule only against union adherents it is clear that the rule's purpose is not the efficient conduct of his business but interference with the statutory right to organize and assist unions. In such a case the justification for the interference with communication which is involved in any rule against solicitation fails and the

rules violates the Act.[12] Thus, in cases in which the employer would ordinarily be permitted to establish a broad no-solicitation rule, applicable even during non-working time, the fact that he failed to apply this rule when the solicitation was against the union would destroy the justification for the rule and establish that its imposition was an unlawful interference with the rights of the employees.[13]

Similarly, in cases involving the distribution of literature, it has always been assumed that the employer's rule, to be valid, must be evenly applied. In all of the cases in which rules limiting employee distribution were upheld, the Board's approval has always been based on the assumption—usually explicitly stated—that the rule was applied non-discriminatorily in the light of its purpose and that its purpose was not to favor one side or the other on the union question but to prevent littering.[14]

Where discrimination has been found, the Board's answer has, at least until this case, been very simple. The fact of discrimination destroys the justification for the rule and establishes that it constitutes interference with the right of the employees to communicate with each other concerning union organization in the most natural forum. Where discrimination has been found neither the Board nor the courts have had the slightest hesitancy in finding a violation of

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[12] *Macon Textiles, Inc.*, 80 NLRB 1525 (1948); *NLRB* v. *Peyton Packing Co.*, 142 F. 2d 1009 (1944); *Lindley Box & Paper Co.*, 73 NLRB 553 (1947). *Jacques Power Saw Co.*, 85 NLRB 440 (1940).

[13] In *May Department Stores*, 59 NLRB 976 (1944); *enforced* 154 F. 2d 533 (C.A. 8, 1946), the Board simultaneously established its definitive rule that all solicitation on the selling floor of a retail establishment could be banned, and found a violation of the Act because such a rule was discriminatorily enforced.

[14] "The restriction on the distribution of literature was not discriminatorily enforced." *Tabin-Picker & Co.*, 50 NLRB 928, 930 (1943); *Goodyear Aircraft Corp.*, 57 NLRB 502 (1944); *North American Aviation*, 56 NLRB 959 (1944).

the Act, even if in the absence of such discrimination the employer's rule would be proper.[15]

In view of the uniformity of both Board and Court opinion as to the illegality under the Act of the discriminatory application of no-solicitation or no-distribution rules, we think that it is clear that it is not within "management's prerogative" under the Act to deny the right to engage in such activities to union adherents, while granting the same right to those opposed to the union—whether they be employees or "the businessmen of Red Bud," as in *American Furnace Co.*, 158 F. 2d 376, 379 (C.A. 7, 1946).

The same principle of non-discrimination applies even to non-employee distribution or solicitation. Here, at least since this Court's decision in *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105, the shoe is usually on the other foot. With respect to employees, who are on the employer's property with his permission and to do his work, no restrictions are permissible unless justified by the necessities of production or discipline. With respect to non-employees, however, *Babcock & Wilcox* held, the employer may normally forbid access to the property or the right to distribute literature, unless it can be shown that special circumstances exist which prevent the union from reaching the employees through

[15] Thus in *Macon Textiles, Inc.*, 80 NLRB 1525 (1948), the employer had a rule against solicitation on working time. Such a rule is ordinarily proper. But the Board found that the rule had been enforced only against union adherents and not against anti-union employees. The Board, therefore, in accordance with its well-established rule, found that the employer had violated the Act by discriminatorily enforcing its rule. See also, e.g., *Glen Raven Silk Mills, Inc.*, 101 NLRB 239 (1952); *NLRB* v. *American Furnace Co.*, 158 F. 2d 376 (C.A. 7, 1946); *NLRB* v. *William Davies Co.*, 135 F. 2d 179 (C.A. 7, 1943); *NLRB* v. *Peyton Packing Co.*, 142 F. 2d 1009 (C.A. 5, 1944), *cert. denied* 323 U. S. 730; *American Thread Co.*, 101 NLRB 1306 (1952). In the *American Thread* case, the Court of Appeals for the Fifth Circuit refused enforcement only because, on examination of the record, it found that there was no disparate enforcement of the rules. 210 F. 2d 381, 382, 383 (1954).

other available channels of communication. See, e.g., *N.L.R.B.* v. *Lake Superior Lumber Co.*, 167 F. 2d 147 (6th Cir., 1948); *N.L.R.B.* v. *Waterman SS Co.*, 309 U.S. 206, 224, and the cases cited in *Republic Aviation Corp.* v. *N.L.R.B.*, 324 U.S. 793, 799.

But even the right to limit distribution by non-employees is subject to the requirement of non-discrimination. As this Court said in the *Babcock & Wilcox* case, an employer may forbid such distribution on his property, absent special circumstances, only "if the employer's notice or order does not discriminate against the union by allowing other distribution." 351 U.S. at 112.

What of the employer himself? Can the employer himself engage in working time solicitation or within the plant distribution, or order his supervisors to do so, while simultaneously forbidding such activity to his employees? At first sight, the answer plainly would seem to be no. If it offends the Act to forbid employees to speak or distribute while allowing anti-union outsiders to do so, it would seem to follow a *fortiori* that the Act is offended when the favored group are supervisors, distributing anti-union literature or company union announcements. Yet the Board in this case, Judge Allen in the *Woolworth* case and Judge Swan in the *Bonwit Teller* case, came to the conclusion that employers have a special prerogative to advance their own anti-union arguments in a forum which, under all the precedents, they must deny to all if they deny to any. To understand how this conclusion is reached—and its error—we must turn to consideration of the "free speech" provision of the Act—Section 8(c).

4. *Employer Free Speech.* An NLRB election campaign, after all, is concerned with determining whether the employees wish to have a union represent them in dealing with the employer. It is a controversy as to what method the employees shall use in dealing at arm's length with the employer. It can be very well argued that it is improper

for the employer to inject himself into this controversy. Furthermore, the employer *is* the boss. In the absence of a union contract, he has discretion as to how he hires, fires, grants or withholds "merit" increases, promotes and demotes. His arguments against a union may have force with the employees, not because of the persuasiveness of what he says, but because of the hidden coercive powers implicit in his position as employer.

Considerations such as these led the National Labor Relations Board early in its history to say that any serious anti-union propaganda by an employer constituted unlawful interference with his employees' self-organization rights. Employer expressions of opinion were regarded as having special, coercive, implications because they were *employer* expressions. In the words of Gerard Reilly, dissenting in *Clark Bros. Co.*, 70 NLRB 802, 809 (1946), *enforced* 163 F. 2d 373 (C.A. 2, 1947):

> "Until recent years this Board had always assumed that an employer had no right to express his opinions to his employees with respect to a union which might be seeking to act as their representative. Numerous decisions of the Board laid down the principle that it was the duty of an employer to remain completely neutral so far as his utterances in the plant were concerned. Consequently, any appeals by employers against unions or in favor of particular unions which were made in verbal addresses to the employees or reduced to written form and distributed on plant bulletin boards, in handbills, or in envelopes which reached the workers were considered to be violations of Subsection 8(1) of the Act, on the theory that such arguments were 'an interference' with the right of self-organization guaranteed to employees by Section 7 of the Act."

This line of decision reached an end, however, when this Court made it crystal clear that employer expressions of opinion were protected by the First Amendment as "free

speech." *NLRB* v. *Virginia Electric Power Co.*, 314 U. S. 469 (1941). And see *Thomas* v. *Collins*, 323 U. S. 516, 537 (1945), noting with approval *NLRB* v. *American Tube Bending Co.*, 134 F. 2d 993 (C.A. 2, 1943) *cert. denied* 320 U. S. 768.

Following these rulings the Board abandoned its requirement of neutrality and conceded that employers were free to express their opinions on the union question. In the *Clark Bros.* case, *supra*, however, the Board found that when an employer compelled his employees to listen to an anti-union speech he did violate the Act—not because of his speech but because of the compulsion to listen.

At this juncture Congress intervened. In Section 8(c) of the 1947 amendments to the Act it was provided that

> "The expressing of any views, argument or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit."

Senator Taft described this provision, on the floor of the Senate, in the following words:

> "Mr. President, on page 16 the bill contains a provision guaranteeing free speech to employers. That provision in effect carries out approximately the present rule laid down by the Supreme Court of the United States. It freezes that rule into the law itself, rather than to leave employers dependent upon future decisions." 93 Cong. Rec. 3837 (1947).

The report of the Senate Committee, however, indicated that something more than confirmation of the Supreme Court's decisions may have been intended. Specifically, the Committee said that the Board had limited the effect of the Supreme Court's decisions by its "captive audience" doctrine in the *Clark Brothers* case and by other cases in which

speeches were held coercive "if the employer was found guilty of some other unfair labor practice, even though severable or unrelated." These decisions were too restrictive, the Committee said, and Section 8(c) was intended to correct them. Senate Report No. 105 on S. 1126, 80th Cong., 1st Sess. (1947) pp. 23-24.

The net effect of Section 8(c), then, was at the least to confirm this Court's earlier "free speech" rulings, or at the most to outlaw the Board's *Clark Bros.* doctrine and the use of unrelated unfair labor practices to convert uncoercive speech into forbidden speech. If we give Section 8(c) the broadest possible significance, the most that can be said for it is that it removed from the employer, finally and definitely, any restriction on his freedom of utterance which might be found to inhere in his status of employer. As so read, Section 8(c) says that even if an employer is guilty of other unfair labor practices and even if he requires the employees to listen to him, still his speech—whether written or oral—is to be regarded just as if it were an outsider's expression of opinion. The employer is to be as free as the next man.

But this, surely, does not mean that he is to be more free than the next man. He is no longer required to be neutral. He can enter the anti-union lists and become an active participant in the campaign. The rules which placed special restrictions on him because he is the employer are statutorily eliminated. But the fact that his speech is free does not give him the right to restrict the speech of others.

5. *Free Speech and No-Distribution and No-Solicitation Rules.* We are now ready to tie these threads together. The cases on no-solicitation and no-distribution rules established that even though such rules did to some extent interfere with the organization of unions and the other rights guaranteed by Section 7 of the Act, such rules were not in themselves unlawful, if properly limited, if they were neces-

sary to the efficient conduct of the employer's business. The area in which such rules could lawfully operate depended, to a measure, upon the particular circumstances. But, whatever the permissible area, the rules were always subject to the condition that they be non-discriminatorily applied. If the employer permitted anti-union employees or third persons to violate the rules he could not lawfully enforce them against pro-union employees. If he did, the prohibition against soliciting or distribution—not the anti-union solicitation or distribution—lost its privileged status and was regarded as an unlawful interference with the employee's rights.

The fact that the employer is given the right to speak freely by Section 8(c) should not change this result. Discriminatory enforcement of the rules is still discriminatory, whether the favored individuals are anti-union employees, or third persons, or the employer himself. And so the Board and the courts have held until recently.

The first case in which the Section 8(c) issue was squarely decided was *Goodall Co.*, 86 NLRB 814 (1949). The Board there adopted, without even discussing the question, the Trial Examiner's report, which said:

> "The issue presented by the foregoing evidence is not whether an employer has a right to prohibit union activity during working hours or to make speeches to employees during that time or to engage in anti-union propaganda. The question is whether he may reserve such rights to himself, while at the same time interfering with, or preventing, employees from talking about a union and soliciting members for it. It is well established that discriminatory conduct of that nature violates the statute. The Examiner finds that in engaging in anti-union activity during working hours and in authorizing and permitting supervisors and employees to do so, while prohibiting employees from soliciting membership for the Union and interfering

with discussion concerning it, during working hours, the Respondent discriminated against its employees and thus violated Section 8(a)(1). (86 NLRB 814 at 841-842.)

A similar result was reached, without discussion, in *Allen-Morrison Sign Co.*, 79 NLRB 904 (1948) (no-solicitation rule; supervisors solicited against union), *Kentucky Utilities Company, Inc.*, 83 NLRB 981 (1949) (same), and *Editorial "El Imparcial" Inc.*, 92 NLRB 1795 (1951) (same).

These cases and, in particular, the reasoning of the *Goodall* case would seem to dispose of this case. The Board here, however, came to the opposite result. It did so in reliance on its own decision in *Livingston Shirt Co.*, 107 NLRB 400 (1953). To understand the reasoning involved in this reliance it is necessary to digress and discuss briefly the history of the Board's *Bonwit Teller* doctrine and its ultimate reversal in the *Livingston Shirt* case.

6. *The Bonwit Teller Doctrine.* In *Bonwit Teller, Inc.*, 96 NLRB 608 (1951), the Board was faced with a department store in which a broad no-solicitation rule, covering non-working time, had been invoked, as is proper in such establishments. At the same time, the employer utilized the premises to make an anti-union speech on company time to a "captive audience." In addition, there was a union request, which the employer had denied, to address the employees in the same forum. If the "captive-audience" speech could be regarded as in violation of the no-solicitation rule, then it would seem to follow, on the basis of established precedent, that there was disparate enforcement of the rule and a violation of the Act.

The Trial Examiner so held[16] and recommended an order derived from this holding. The Board, however, went further. It did not merely issue an order merely forbidding

[16] 96 NLRB at 629-532.

the company to enforce its no-solicitation rule in a discriminatory manner. Instead, relying on a suggestion in the opinion of the Court of Appeals in the *Clark Brothers* case, 163 F. 2d 373, 376 (C.A. 2, 1947) the Board forbade the employer to make anti-union speeches to employees on company time and property unless he acceded to the union's request that it be provided a similar audience. In so doing, it relied upon a doctrine of equal opportunity "wholly apart from the disparate use of the no-solicitation rule." 96 NLRB at 612. This doctrine was that employees had a right, under Section 7 of the Act to hear both sides of the story under reasonably equal circumstances. Therefore, an employer who used the "captive audience" technique against a union unlawfully interfered with the employee's free choice if he did not affirmatively provide the union an equal opportunity to reply in the same way.[17]

The *Bonwit Teller* case quickly became the *Bonwit Teller* doctrine, and was applied by the Board in the absence of a broad non-working time no-solicitation rule[18] and, indeed, in the absence of any no-solicitation rule at all.[19] It received, however, only limited acceptance in the courts. The decision of the Board in the Bonwit Teller case itself was approved by the Second Circuit by a 2-1 vote, with Judge Swan dissenting, only on the limited ground relating to the discriminatory enforcement of the no-solicitation rule. The court refused to enforce that part of the Board's order which required the employer to provide equal opportunity to reply to "captive-audience" speeches. 197 F. 2d 640 (1952) *cert.*

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[17] 96 NLRB at 612.

[18] See, e.g. *Higgins, Inc.*, 100 NLRB 829 (1952); *American Tube Bending Company*, 102 NLRB 735 (1953); *Gruen Watch Co.*, 103 NLRB 3 (1953).

[19] See, e.g. *Biltmore Manufacturing Co.*, 97 NLRB 905 (1951); *Metropolitan Auto Parts Inc.*, 99 NLRB 401 (1952); *Onondaga Pottery Co.*, 100 NLRB 1143 (1952); *National Screw and Manufacturing Co.*, 101 NLRB 1360 (1952).

denied 345 U. S. 905. In *NLRB* v. *American Tube Bending Co.*, 205 F. 2d 45 (C.A. 2, 1953) Judge Learned Hand made clear his view as to the limited nature of the Second Circuit's earlier decision—upholding a Board order against the discriminatory enforcement of an unlawfully broad no-solicitation rule but stating clearly that, in the absence of such a rule, the employer was under no duty to provide an audience for the union. Judge Swan concurred, under constraint of the majority opinion in Bonwit Teller. Judge Frank on the other hand disagreed with Judge Hand's narrow interpretation of the *Bonwit Teller* decision.

Despite this limited judicial acquiescence in the *Bonwit Teller* rule the Board continued to apply it broadly. See *Metropolitan Auto Parts, Inc.*, 102 NLRB 1634 (1953). There the matter stood until, after the elections of 1952, there was a change in the personnel of the Board.

As a result of this change, there emerged the decision in the *Livingston Shirt* case upon which the Board relied here. In *Livingston Shirt* there was a narrow no-solicitation rule, prohibiting solicitation only during working hours. The employer delivered speeches to employee assemblies during working hours just prior to an election urging a vote against the union. The Board, by a divided vote held that this was not a violation of the Act. It explicitly reversed the *Bonwit Teller* doctrine although not the *Bonwit Teller* case.

Chairman Farmer and Member Rogers, the two new members of the Board, rested their decision primarily on the free speech provisions of Section 8(c). They said that the grant of this right in Section 8(c) could not be conditioned by a requirement that the employer who exercises it must donate his premises and working time to the union for the purpose of propagandizing the employees. They did not disagree with the premise of the equality of opportunity doctrine but held that that doctrine's requirements were met because the employer could address meetings in the plant and the union could address meetings in the union

hall. Member Peterson concurred in the result, but not in the opinion. In his view, Section 8(c) and free speech had nothing to do with the case. He concurred, nevertheless, on the sole ground that the Board's broad application of the *Bonwit Teller* case had not received Court approval. Member Murdock dissented.

The majority in the *Livingston Shirt* case did retain one part of the Bonwit Teller doctrine: the specific holding in the *Bonwit Teller* case. Even in the view of the majority it would still be an unfair practice for an employer to deny a union opportunity to reply to a captive audience speech if the employer enforced a broad no-solicitation rule governing non-working time, whether that rule was valid, as in retail stores, or not.

This retention of the specific holding on the *Bonwit Teller* case seemed to be inconsistent with the view that Section 8(c) of the Act forbids the Board to condition the exercise of employer free speech on the nonenforcement of a rule limiting employee speech, and that inconsistency was promptly noted when the Board sought enforcement of its order in just such a case. *NLRB* v. *Woolworth Co.*, 214 F. 2d 78 (1954). In that case the Sixth Circuit, after the *Livingston Shirt* decision, refused to enforce the Board's order. There were three opinions. Judge Allen, speaking almost in the language of the new members of the Board, said that a no-solicitation rule, no matter what its scope, cannot cut down the right of free speech. If the no-solicitation rule was valid, for the reasons found by the Board, the fact that the Company made a speech to the employees on company time could not make it invalid in light of the provisions of Section 8(c). Judge Allen flatly disagreed with the Second circuit's *Bonwit Teller* decision and agreed with Judge Swan's dissent. Judge Miller concurred in the refusal to enforce the Board's order requiring that a captive audience be provided the union, particularly in view of the Board's *Livingston Shirt* case. He did not, however, con-

cur in Judge Allen's refusal to condemn discriminatory enforcement of a broad no-solicitation rule. As to that, he said that the rule against solicitation on non-working time had not been enforced against employees and, hence, was not involved. Judge McAllister dissented.

7. *The Application of Livingston Shirt to This Case.* The precise holdings of the *Livingston Shirt, Bonwit-Teller,* and the *Woolworth* cases with respect to the "captive audience" question are not involved here. In those cases the request denied by the employer was a request by a union organizer (not an employee) that the employer take the affirmative action of assembling the employees on company premises in order to hear a speech by the organizer. In this case, on the contrary, the union's grievance is not that the employer should distribute leaflets for it—although the employer did both mimeograph and distribute leaflets for the company union which was organized after the election. The grievance of the union here is simply that the employer refused to permit the employees to distribute their own leaflets in the plant, during non-working time, while supervisors were being directed to distribute anti-union leaflets on the same premises.

But, we concede, the reasoning of these cases with respect to Section 8(c) cannot be distinguished. The *Bonwit Teller* case says that there is no issue as to free speech where a no-solicitation rule is found to be discriminatorily enforced because the employer violates it. Judge Allen's opinion in *Woolworth* and the Board's opinion in *Livingston Shirt* hold, to the contrary, that the presence of a no-solicitation rule cannot limit employer free speech. The reasoning, in each case, is equally applicable to the no-distribution rule involved here. In that respect, at least, we agree with the Board's opinion in the present case. But, for the reasons already indicated, and those set forth below, we believe that the Second Circuit is right and Judge Allen and the Board are wrong and we urge this Court so to hold.

8. *Conclusion.* We do not think that it will be disputed that an employer who permits anti-union employees, or third persons, to distribute literature and prohibits only the distribution of pro-union literature on his property violates the Act. Does Section 8(c), as the Board here held, require a different result when the distribution is made by the employer or his supervisors? Plainly, we think, not.

Section 8(c) guaranteed free speech to employers. But the right of an employer to speak has nothing whatever to do with whether he has unfairly prevented others from speaking. The fact that he has spoken may be what makes the restriction on others unfair but it is the restriction which violates the Act, not the speech.

This is most easily seen when the position of third persons (the "businessmen of Red Bud"), or of the anti-union employees is considered. They are entitled to free speech too. Of this there never was any doubt even before Section 8(c). And, if 8(c) does add anything to the right of free speech, it adds it equally to the rights of employees and third persons, since the section is not limited to employers.

It must follow, then, if the right to speak is determinative, that all of the cases in which it has been held that the employer violated the Act because he permitted third persons and anti-union employees to speak, while preventing others, are wrong. After all, the businessmen of Red Bud came on the employer's property with his permission. Employees are there by virtue of the invitation of the employer. They have the full right to use the employer's property if he gives it to them. They also have the right to speak and, by Section 8(c), that speech cannot constitute an unfair labor practice. Therefore—on precisely the same reasoning as the Board has used—it would rob Section 8(c) of meaning to condition their right to speak on the non-enforcement of the no-solicitation or no-distribution rule as to others.

This is plainly nonsense. But, we submit, it is the same nonsense as that contained in the Board's opinion here and

the opinion in the *Woolworth* case. It will not do to answer, as the Board's brief here does, at pp. 30-31, by saying that in these other cases "the employer has given direct economic assistance to one rival union group and withheld it from another." This is, first, not true, and, second, irrelevant to the Board's argument. The "businessmen of Red Bud" were not a rival union group in *American Furnace Co.*, 158 F. 2d 376, nor were the employees who opposed any union in the cases cited *supra* at notes 12-15. In any case, if Section 8(c) forbids the Board to find an unfair labor practice in an employer's communication on plant property, it is difficult to see why it does not also prevent the finding of an unfair labor practice where others do the speaking with the employer's permission.

To put the matter in another way, if it is true, as Judge Allen says, that no conditions can be attached to the right of free speech guaranteed by Section 8(c), then the employer here has interfered with the pro-union employees' right of free speech by denying to them the privilege of distribution within the plant, as well as the rights guaranteed by Section 7. But we have conceded that the Board can balance the interests of all parties in free speech with the needs for efficient operation of the plant. It can permit the imposition of a proper no-distribution rule. But, by the same token, it cannot be said that the employer's right of free speech is limited by insisting that the rule—if it is to exist—be applied to all.

III

THE THEORY ADVANCED BY COUNSEL FOR THE BOARD IN THIS CASE IS WHOLLY WITHOUT MERIT AND CONTRADICTS THE ENTIRE PHILOSOPHY OF THE FEDERAL ACT.

1. *The Theory of the Board's Brief.* In our argument above we have set forth, in perhaps more detail than is required, the established Board doctrines with respect to no-solicitation and no-distribution rules as they have been ap-

plied by the Board and the courts over the years to a variety of factual situations. We have done so primarily to show the error of the Board in relying on Section 8(c) and the correctness of the decision below.

The discussion of the development of the various Board rules with respect to solicitation and distribution also serves, we believe, to underline the extent to which counsel for the Board, in their argument in this Court, have departed, not only from the Board's decision in this case, but also from the underlying premises which have governed these questions since the federal Act was passed.

We have already pointed out in our Introductory Statement, that the argument now advanced by counsel for the Board is quite different than the simple 8(c) theory expressed by the Board itself and by Judge Allen in *Woolworth* and Judge Swan in *Bonwit Teller*. That theory simply is that if a rule limiting solicitation or distribution is valid, then no solicitation or distribution by the employer or his supervisors can make it invalid, since Section 8(c) provides that employer expression of opinion shall not constitute an unfair labor practice. In this view, the nature of the rule or of its infraction by the employer, is immaterial, and the same principle applies to no solicitation and no-distribution rules. In our argument above we have agreed that the nature of the rule is immaterial. But we have urged that, as the Court of Appeals held in this case, when a rule, permission to establish which is "engrafted upon the statute, is not applicable to a given employer, the unrestricted prohibition of the statute against interference with employee activities comes into play" and the rule itself is invalid. (R. 109)

The brief which counsel for the Board have filed here appears to compromise the question. Unlike either the Board itself or the court below, counsel now argue that no uniform answer can be given. Whether or not employer communication which contravenes a rule limiting employee com-

munication in the plant is an unfair labor practice, they say, depends upon the nature of the rule. If the rule is one forbidding oral solicitation on non-working time, employer solicitation on plant property is a violation of the Act and Section 8(c) is irrelevant. On the other hand, if the rule is one forbidding employee distribution of literature within the plant on non-working time, employer distribution within the plant is not an unfair labor practice but is protected by Section 8(c). The difference between the two situations, counsel for the Board say, lies in the fact that printed material can be distributed elsewhere but there is no adequate substitute for oral solicitation on plant property.

As must be readily apparent, this reasoning in effect washes Section 8(c) out of the case. If the test is, as counsel for the Board now assert, whether other channels of communication are adequate, then the fact that an employer communication is alleged to be one element of the unfair labor practice is not determinative. The answer is the same whether or not one believes that Section 8(c) is applicable.

The new position now asserted by counsel for the Board may seem, superficially, to be a more moderate position than that asserted by the Board itself. On analysis, however, it undermines the basic premise concerning the relationship between employee organizational rights and the employer's property rights which has been fundamental to the entire course of court and Board decisions in the years since the National Labor Relations Act was first passed. And it is supported by no citation of authority, either from the Board or from the courts, except possibly the 1953 Board decision in the *Livingston Shirt* case.[20]

The basic premise upon which our entire argument here has been based, and upon which the decision of the Court of Appeals below was based, was the established rule, expressed in literally scores of cases, both in the Board and in

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[20] 107 NLRB 400.

the courts, that no restriction on the employees' right to discuss self-organization among themselves was permitted under the Act unless it could be demonstrated that the restriction was justified by the necessities of plant operation. Only a year ago, this rule was stated flatly by this Court in *NLRB* v. *Babcock & Wilcox Co.*:

> "No restriction may be placed on the employees' right to discuss self-organization among themselves, unless the employer can demonstrate that a restriction is necessary to maintain production or discipline. *Republic Aviation Corp.* v. *Labor Board,* 324 U. S. 793, 803." 351 U. S. at 113.

Prior to the *Babcock & Wilcox* case, the Board had applied this same rule not only to employee activity but also to non-employee organizers. But this Court, in *Babcock & Wilcox,* established that "a different consideration" applied in the latter case. With respect to non-employees, this Court said, there is a question as to whether a restriction established by the employer would have the effect of placing "employees beyond the reach of reasonable union efforts to communicate with them." If such conditions were shown to exist, then the restriction might violate the Act. Otherwise, the restriction as to non-employee organizers would be assumed to be valid. The distinction between the rules applicable to employees and non-employees, this Court said, is "one of substance." *Id.*

What counsel for the Board have attempted to do in this case is, in substance, to make the rule which this Court has said must be applied to non-employees now also apply to employees. The "critical consideration"[21] which counsel for the Board now assert was overlooked by the Court of Appeals is that interference by the employer with distribution of literature can be justified, not only by demonstrating that such restriction is necessary to maintain production by pre-

[21] Bd. Brief, p. 11.

venting littering of the plant, but also by the fact that adequate avenues exist for employee distribution of literature outside the plant. Therefore, counsel for the Board argue, the fact that the Company in this case demonstrated, by ordering its supervisors to engage in precisely the kind of distribution forbidden by its rule, that the elimination of littering was not the purpose of the rule is still insufficient. The rule can still be regarded as valid because employees can effectively distribute literature at the plant gates and, hence, the rule does not have the effect, in this Court's words, of placing "employees beyond the reach of reasonable union efforts to communicate with them."

The major premise of the Board's entire brief is thus that limitations on employee communication on plant property may be justified not only by the necessities of production or discipline but also by the existence of alternative methods of employee communication. Even if no justification is shown, a rule limiting employee solicitation may be valid if other channels of communication are open. To this major premise are added two minor premises: (1) that there is no satisfactory alternative to oral discussion among employees on plant property, and (2) that in the case of the distribution of literature, there is a satisfactory alternative in the presumed ability of employees to distribute literature with equal effectiveness either inside or outside the plant gates. From these premises it follows quite logically that when an employer forbids oral solicitation on the plant premises but engages in such solicitation himself he violates the Act. But when the employer forbids the distribution of literature within the plant but distributes his own anti-union literature in the plant there is no violation.

We do not quarrel with the logic. We quarrel with the premises, both major and minor.

2. *The Board's Major Premise.* It should be clear already that the Board's major premise is in clear contradiction to the terms of the National Labor Relations Act and

all of the precedents which have been developed under it. The Act says, in no uncertain terms, that any interference by the employer with the rights guaranteed to employees by Section 7 of the Act is an unfair labor practice. The absolute terms of the statute have been modified by interpretation to permit employers to limit what are clearly activities protected by Section 7, but only if it can be shown that such limitation is necessary. A showing that the employees can engage in other Section 7 activities, or even the same Section 7 activities, off the plant premises has never been regarded as sufficient to justify a rule preventing such activities on the plant premises.

Methods of communication are not alternative but cumulative. It is not a sufficient answer, when an employee is deprived of the right to communicate either orally or in writing with another on the question of union organizing to say that such communication can take place at a different place or by a different method. In the absence of the restriction it could take place in both. By eliminating one of the many forms which union organizational activity takes, the employer interferes with rights protected by Section 7 of the Act. Therefore, such interference is a violation of the Act, even if other methods of communication are open, unless the employer can justify that interference in terms of the necessities of his industrial operation. Any other view is the equivalent of telling an advertiser who can advertise in one newspaper he is deprived of nothing if he can't advertise in another. Obviously union organizational efforts use many channels, oral solicitation within the plant, visits to workers in their homes, meetings in the union hall, distribution inside the plant, and, as the Board brief says, "distribution at plant gates, distribution by mail, distribution to the employees at their homes or at the union hall," [22] to name only a few.

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[22] Bd. Brief, p. 41.

But, as the employer's actions in this very case show, the existence of one channel does not destroy the utility of others. NuTone mailed at least eleven anti-union circulars or letters to its employees during the election campaign (R. 61, 64-65). It still felt it desirable and useful also to distribute eight pieces of anti-union propaganda inside the plant. Its action in so distributing, in addition to mailing, clearly shows that its ban on employee distribution limited the effectiveness of employee organizational activity even though the employees or the union also had other methods of distribution. And such interference, unless justified, violates the Act.[23]

How do counsel for the Board justify their departure from a proposition as clearly established as the one discussed above? They do so by interjecting a conception which runs contrary to the entire course of Board and court decision in the years since the National Labor Relations Act was first passed. That conception is that an employer is entitled to use the fact that he owns the plant property and can make rules concerning its use as a weapon in the contest to determine whether the employees will vote to be represented by a union. His property rights, not the necessities of production or discipline, are what justify his actions and he is entitled to use those property rights against union organization so long as he does not cut off the channels of employee communication while preserving only his own. So long as he does not go that far, any disparity in the rules applicable to employees and the actions which the employer himself takes are justified, not by the necessities of production, but

[23] The cumulative effect of using different methods of communication is well recognized by employers. See Johnson & Johnson, Inc., *Guiding Rules for Communications*, reprinted in Baker, Ballantine and True, *Transmitting Information Through Management and Union Channels* (Princeton University, Industrial Relations Section, 1949) p. 134.

by the fact that it is the employer's property on which all of this activity takes place.

It is this basic approach which explains *Livingston Shirt,* 107 NLRB 400. In the view of two of the members of the Board in that case, the fact that an employer called the employees together on working time to deliver a lecture against unionism, while at the same time forbidding employees to discuss unionism on working time, did not involve any violation of the Act, since, after all, it was his plant and he was paying for the working time. It was all right for him to say that "working time is for working," as far as employee solicitation is concerned and, at the same time, to direct the employees to stop work and to listen to his anti-union speech. This, the Board said, was not an unfair labor practice so long as the channels of communication were left open by permitting the employees to discuss the union question on their non-working time. Any unfairness or disparity in the opportunity to discuss the union question which might exist as the result of the combination of the no-solicitation rule and the employer's use of working time to solicit against the union was justified, they believed, because it was a consequence of the employer's ownership of the property and of the working time. The Union, the Board said, retained equality of opportunity because it could deliver speeches in the union hall.

Similarly, in this case what counsel for the Board essentially argue is that the employer's right to forbid the distribution of union literature on his premises, while forbidding the employees from doing the same thing, is a proper consequence of the fact that the employer is entitled to use his ownership of the property as justification for his use of a method of solicitation which is forbidden to the employees. Again, as in *Livingston Shirt,* the only restriction is that the employees should have some other channels of communication and any unfairness or disparity in opportunity which may result from the simultaneous imposition of the rule and

the employer's non-observance of it is to be ascribed to his lawful use of his own property and is not to be regarded as a violation of the act.

We think it plain that this whole conception of the relationship between property rights and the National Labor Relations Act is erroneous. It is contradicted by the whole tenor and purpose of the Act. The purpose of the Wagner Act, clearly, was to facilitate employee organization and it was precisely to assure that employers would not use the fact that they are the employers, and do own the plant property and do pay for the working time, to inhibit efforts at union organization. In 1947 the Act was amended. But the premise of the amendment was "that a fair and equitable labor policy can best be achieved by equalizing existing laws in a manner which will encourage free collective bargaining." S. Rep. No. 105, 80th Cong., 1st Sess., p. 2. Clearly, the proposition that employers can use the fact that they are employers, that they own the premises and pay for the working time, to interfere with the efforts of their employees to organize themselves is not part of any program of equality.

We are not talking here, be it noted, about "private property unconnected with the plant," as in *NLRB* v. *Stowe Spinning Co.*, 336 U.S. 226, 229. Even with respect to such property, this Court held in *Stowe Spinning*, the Board may find a requirement of non-discrimination under the special circumstances existing in a company-dominated mill town. But here we are talking about the place of employment itself. As all members of the Court in *Stowe Spinning* recognized, there is a "distinct line of cleavage as to the rights of employees between facilities and means of production open to use of employees through their employment contract and other property of the employer." 336 U.S. at 240. The Board, in *Livingston Shirt*, however, recognized no such distinction. Permitting the union to address the employees on

plant property, after the employer had done the same, the Board said, would be requiring him "to donate his premises" to the union.

The Board did say, in *Livingston Shirt,* that it recognized the principle that employees are entitled "to hear both sides under circumstances which approximate equality." 107 NLRB at 406. But that equality was to be achieved, it said, by allowing each side the exclusive use of its own private property: the employer could use the working place for anti-union speeches because he owned it, and the union could "assemble and address employees" in the union hall. This is horse and rabbit stew "equality"!

3. *The Board's Minor Premise.* The minor premise of the argument now made by counsel for the Board—that employee distribution can take place as effectively on the street outside the plant as it can inside the plant—is relevant, of course, only if counsel's major premise is accepted. And since this major premise formed no part of the Board decision in this case there is neither discussion nor finding with respect to this second proposition in the Board's opinion. Indeed, the only conclusion with respect to this proposition which is contained in the record is the statement of the Trial Examiner that the Company in this case was "openly and flagrantly campaigning against the Union in *the normal arena, and the most effective one for reaching the employees* . . . while simultaneously denying access to it by the Union." (R. 20, emphasis added.) This statement, of course, is in flat contradiction to counsel's present assertion, on page 42 of their brief, that the employees here were "not prejudiced" because "adequate avenues for employee distribution existed off plant premises."[24]

But, it seems, Board counsel do not seek to rely on any

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[24] Bd. Brief, p. 42.

particular evidence or finding in the record. They assert as a general proposition that "a pamphlet or circular can be handed to an employee as readily when he enters or leaves the plant as when he is in the plant."[25] As a general proposition this is simply not true. And we do not know of any court or Board decision which indicates that it is true. It can be asserted with such assurance only by one who has never had the experience of trying to hand leaflets to employees rushing through the plant gates and finding that the major portion of the proffered leaflets are simply brushed aside or dropped unread.

Nor is it true, as stated by counsel, that organizational literature "is designed to be retained by the recipient for his perusal at his convenience."[26] As anyone who has had experience with such literature knows it is most effective if it is of such arresting nature as to cause the recipient to read it when it is given to him and, indeed, that if it is not of that nature, it is usually not read at all.[27]

These are just a few of the reasons why it is simply not the same thing to hand literature out at the plant gates and to distribute it in the plant during rest periods, lunch hours or other non-working time.[28] As the Company here recognized

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[25] Bd. Brief, p. 23, 11.

[26] Bd. Brief, p. 22.

[27] The Handbook of Trade Union Methods published by the International Ladies Garment Workers Union advises that a leaflet intended to be distributed at the plant gates "where it may be given a hurried glance and throw down" should concentrate on two or three important ideas put in type that is easily read. See also Peters, *Communication Within Industry* (1949), p. 135.

[28] There are many other reasons. For one thing, workers tend to regard acceptance of a piece of literature handed out at the plant gates as likely to indicate that they accept the union and, hence, for reasons of fear or otherwise, many will refuse to accept literature which they would take if it were distributed to all within the plant. Also, distribution in many cases is directed to particular groups of employees who work together—as in the case of a craft election—and it is usually impossible to limit plant gate distribution to such employees. The same kind of problem exists where, as in the garment industry, many shops occupy the same building.

by using plant distribution in addition to mailing, distribution of literature to employees while at their place of work and when they have immediate opportunity not only to read it but also to discuss it among their fellow workers has advantages not obtainable in any other way.[29]

As a matter of fact, it is not entirely clear to us how counsel for the Board even assert that it is reasonably possible for employees effectively to distribute literature to other employees outside the plant gates. Presumably, in a one-shift operation, the employees desiring to distribute literature will be required to enter and leave the plant at approximately the same time as the other employees in order that they be at their jobs at the appointed times. Under the view now set forth they must, somehow, leave work early or race out of the plant before the other employees so that they can stand at the gates before those employees leave and hand them leaflets, or, somehow, arrive late at their work stations so that they can remain at the plant gates distributing literature while the other employees go in.

Distribution by union organizers, or by employees who had been discharged for union activity, as in this case (R. 74-75), is of course subject to none of these difficulties. But again it is nonsense to suppose that distribution is as effective when done by outsiders, or by persons who are the visible evidence of what happens to union adherents, as it is when done by fellow employees in good standing, to say nothing of distribution by foremen and other supervisors. A worker is most likely to read something handed to him by his foreman, less likely to read something given to him by

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[29] The advantage of discussion at the time of distribution is so plain as not to require demonstration. For experimental confirmation, see T. J. Dahle *"An Objective and Comparative Study of Five Methods of Transmitting Information to Business and Industrial Employees"* (Unpublished Doctoral Thesis, Purdue University, 1953) pp. 171 ff.

a fellow worker, and least likely to read something given him by an outsider or a discharged employee.[30]

All of these considerations, we believe, effectively demolish the bland assumption by counsel for the Board that, really, the union wasn't hurt by the employer's actions here. We set them forth because counsel for the Board have raised the question, not because we believe that they are relevant or controlling, or that the Court should pass on them. They do serve, however, to show the kind of area and the kind of considerations which become involved if the major premise of Board's counsel is accepted. In no case dealing with the distribution of literature, so far as we are aware, have those considerations been discussed because in no case, with the possible exception of *Livingston Shirt,* has the major premise of Board's counsel been accepted.

The accepted rule, and the rule which this Court should again re-affirm, is that the only consideration, in deciding whether an employer's restriction of employee communication on plant property is valid, is whether it is demonstrated that the "restriction is necessary to maintain production or discipline." 351 U.S. at 113. Where, as here, the employer engages in precisely the conduct which he has forbidden to employees, both established doctrine and elementary considerations of fairness dictate the conclusion that the restriction against employee activity violates the Act.

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[30] See Johnson & Johnson, Inc., *op. cit. supra,* p. 135; Peters, *Communication Within Industry* (1949) p. 174; Nixon, *Recent Developments in Employer-Employee Communications Research,* in *Communications in Employee Relations.* University of Minnesota Industrial Relations Center Research and Technical Report No. 14.

CONCLUSION

For the reasons above set forth, it is respectfully submitted that the judgment of the court below should be affirmed.

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